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ABSTRACT

This document presents the proceedings of a conference at the University of Alabama designed to examine the legal implications of academic affairs. Papers cover women's rights in academe, and some extra-legal concerns, the outlook for faculty bargaining, an industrial relations approach to faculty collective bargaining, and the courts and academic affairs. (MJM)

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COLLEGE TEACHING AND TEACHERS: LEGAL IMPLICATIONS OF ACADEMIC AFFAIRS

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Proceedings of a Conference

July 8-9, 1973

The University of Alabama

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Edited

by

Thomas J. Diener

Proceedings of a Conference

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PREFACE

About two years ago the Institute of Higher Education Research and Services, responding to numerous requests from higher education officials in Alabama and adjoining states, sponsored a conference on the law and higher education.

Major presentations made to that conference were issued in a publication entitled "The Law and Higher Education: Where the Action Is." Reflecting the issues of the late 1960's and very early 1970's, the focus of that conference was the student--rights, responsibilities, ways in which institutions might use judicial means to protect property and personal rights and preserve tranquility. That document has recently been reprinted and is available again from the Institute.

The mood of higher education continues to shift. Issues and concerns emerge, fade, and reemerge in new forms or spoken by new voices. Thus, numerous college officials again expressed a desire to pursue in greater detail aspects of the life of the academic community and the impact of our legal system on that community. The Institute, noting these requests, agreed to plan and sponsor a conference on the legal implication of academic affairs.

Held on The University of Alabama campus on July 8 and 9, 1973, the conference addressed itself to several significant issues.

As Margaret Dunkle of the Association of American Colleges notes in her paper, the "woman question" on college campuses is here to stay: sex discrimination is a reality and must be dealt with promptly. Marjorie Knowles of The University of Alabama underscores the possibilities for implementing creative change through the mechanism of affirmative action plans.

Parker Young of The University of Georgia suggests that campus confrontations are increasingly between students and faculty rather than students and administrators. Concurrently, the courts are increasingly a forum for the redress of student grievances suffered at the hands of arbitrary teachers and their practices.

Richard Thigpen of The University of Alabama sees the new consumerism in higher education significantly affecting faculty members and the recent trend toward formal collective bargaining. In response, Joan North of The University of Alabama looks beyond the legal parameters to a personnel and industrial relations point of view, and explores the consequences of faculty collective bargaining on other power groups in the academic community.

We are pleased to share these insights not only with those persons who were able to attend the July conference but, by way of this document, with readers throughout this country and abroad.

This conference and these printed proceedings are supported by funds granted The University of Alabama and the Institute by the Carnegie Corporation of New York. This generous assistance does not imply Corporation endorsement of the views expressed or conclusions reached by the conferees.

The conference was sponsored and this report issued by the Institute of Higher Education Research and Services, an arm of The University of Alabama dedicated to the development of human resources and the continuing improvement of post-secondary education institutions in Alabama and the South.

Summer, 1973
University, Alabama
Thomas J. Diener

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WOMEN'S RIGHTS IN ACADEME

by

Margaret Dunkle

The "woman question" on campus is here to stay. Sex discrimination on campus is a reality, not a paranoid myth fabricated by a few "strident libbies." Concerned human beings--women and men, too--are now taking a close look at the world of higher education in an attempt to rectify past wrongs and find new ways to prevent making the same mistakes again.

Women first entered higher education through the back door. They were often only grudgingly or conditionally admitted and, once inside, offered only second-class citizenship. For example, in the early 1800's women were first admitted to college or "normal schools" in quantity so that taxpayers could have cheap teachers for the "common schools" being established to prepare white male children to participate in the democratic government of the country. Even the prestigious eastern colleges for women, with their high academic standards, were founded in large part to help women better fulfill their traditional roles. And still other institutions

opened their doors to women primarily for financial reasons when their male enrollment lagged or to make their college more appealing to male students. Even today, many colleges are only reluctantly abandoning quotas on women and there are fewer places for women than men in many of the most prestigious institutions.

The higher one looks, the worse the situation becomes. If one considers the lot of female students unfortunate, one can only call the plight of female Ph.D.'s competing for academic jobs tragic.

Women are most often found on the lowest rungs of the academic ladder, in "traditionally female" fields (such as social work, nursing, home economics, and education), and in the least prestigious institutions. The more a job pays and the more status it has, the less likely one is to find a woman there. Study after study has shown that women are hired less frequently, promoted more slowly, and paid lower salaries than their equally qualified male colleagues. Ninety percent of the men with doctorates and twenty years of academic experience are full professors--for women with identical qualifications, barely half will become full professors. For example, in one Ivy League institution's School of Arts and Sciences, only two of the 444 full professors (less than one-half of one percent!)

were women in 1971, even though more than 22 percent of its graduate students were women. Although a major mid-western university fared somewhat better with a rousing 2.2 percent, it still had a lower percentage of women on its faculty than it had in 1899. Typically, one finds women as lecturers and instructors and assistant professors, and men as full professors and administrators.

All too often, sex discrimination is so widely accepted that it is regarded as the norm: a man being asked his college average and a woman being asked her typing speed; a male science student being encouraged to go to medical school, while the woman who helped him pass organic chemistry is counseled to become a nurse or lab technician; a woman applicant turned down by an institution, while her lesser qualified male classmate is admitted; women consistently earning thousands of dollars less than their male counterparts; a brilliant woman working for twenty years as an assistant professor, while an average male scholar becomes a full professor; a woman Ph.D. working as an unpaid assistant for her husband because a university's antiquated anti-nepotism rules prevent her from being hired; a male athlete revered as a "real man," while a woman athlete is regarded as a biological misfit; women as "assistants" and "assistant to's" and men as deans

and presidents and vice presidents. And the list could go on and on...

Those who still doubt the existence of discrimination against women in higher education need only look at the rash of new laws that forbid sex discrimination and the controversy surrounding them. Presidential Executive Order 11246 and Title VII of the 1964 Civil Rights Act mandate equal employment opportunity. The Equal Pay Act requires equal pay for "equal work" for all jobs from maids and janitors to professors. And Title IX of the Education Amendments of 1972 (Higher Education Act) requires that female and male students, as well as employees, be treated equally. These laws were passed when the United States Congress finally realized the extent of discrimination against women in education and society at large.

Legislation alone cannot correct decades of habitual discrimination against women, but it can spell out some of the ground rules for a nondiscriminatory educational system. Although discrimination against women has been called the last socially acceptable prejudice, institutions are rapidly learning that discrimination because of the shape of a person's skin is just as unacceptable (and illegal) as discrimination because of the color of a person's skin.

Perhaps it would be useful to take a closer look at this legislation at this point.

In January, 1970 when the Women's Equity Action League (WEAL) filed the first charges of sex discrimination against universities and colleges, there were no laws that prohibited sex discrimination against women in education, faculty or students. Only Executive Order 11246 applied, which forbade contractors from discriminating in employment. It was not enforced with regard to discrimination on the basis of sex. Sex guidelines had not been issued, and the United States Department of Labor's Revised Order No. 4 of Executive Order 11246 (which details the requirements for affirmative action plans) did not include women; it applied only to minorities. We have come a long way in the past three years, but there is much still to be done.

This Executive Order forbids all contractors from discrimination in employment. It doesn't affect students unless a student is also an employee. It is not law, but a series of rules and regulations that all federal contractors must follow. Its main provision is that it is not enough to stop discriminating and that the contractor has to have an affirmative action plan. If a contractor doesn't have an acceptable plan, he (and the contractor is usually a "he") can lose money--i.e., federal contracts.

The Department of Labor's revised Order No. 4 tells a contractor how to set up an affirmative action

plan. The contractor needs to do at least the following:

1. develop data based on all job classifications
2. have a policy statement which forbids discrimination
3. appoint a person to be in charge of the program
4. examine recruiting, hiring, promotion policies, salaries, and other conditions of employment
5. identify areas of underutilization; develop specific plans to overcome underutilization
6. develop numerical goals and timetables.

Perhaps the most controversial issue is goals and timetables. These are not quota systems. Quota systems keep people out; goals are numerical aims contractors try to achieve to get people in. The employer sets goals in line with the number of women available. Goals are targets one tries to achieve. Goals are not quotas and those who confuse the two often turn out to have ulterior motives.

What happens if a contractor doesn't meet the goals? He has to show that he made a good faith effort, that he really tried to recruit, hire and promote women and he has to produce records documenting his efforts. If, for example, he contacted women's groups and women scholars, and if his letters to colleagues and job advertisements said something like "women and minorities, including minority women, are welcome to apply," if he has done this and if it turns out that all the women he interviewed have virtually no

publications, didn't complete the doctorate, etc., and the man he hired has 6 million publications and won the Nobel prize at age 15, etc., if he can show good faith and document his efforts, nothing happens, for the obligation to meet the goal is not absolute.

There is no intention whatsoever to force employers to hire unqualified women or minorities. If the best qualified person is a pale male, that's who is hired. The employer must show good faith--make a genuine effort to recruit women. (Good faith does not mean calling one's white male colleague, asking if he knows a good guy and then saying, "I'd have hired a qualified woman if I could have found one.") The employer must use equal criteria: whatever standards or criteria the employer sets for men, they have to be applied equally to women and, of course, minorities.

Also, employers in universities have never before had to specify criteria for hiring and promotion. Now the United States Department of Health Education and Welfare (HEW) is asking them to explain why Mr. X is a full professor and Ms. Y is a lecturer, particularly when X hasn't published since he rewrote his thesis, and is a terror to the students, while Ms. Y is continually awarded the "best teacher" award and has a string of publications. HEW, incidentally, will <u>not</u> set criteria for hiring and promotion

for an institution. Rightfully, the institute and/or department heads should do this. What HEW does ask is why someone was hired or not hired, and what the criteria were. If one has never had to justify a hiring or promotion decision, this is a pretty threatening thing to be asked. On the other hand, if an administrator can't justify a hiring or salary decision, then either somebody is in the wrong job or getting the wrong salary, or else you have a lousy administrator.

Why are universities so upset? They have generally relied on the "old boy" method of recruiting, the vast informal network of old school chums, colleagues, and drinking buddies--a network from which women have largely been excluded. To recruit in a different manner means change and change is never easy, particularly if it means women and minorities coming in to threaten the power base.

There is a lot of talk now about preference--and most of the controversy about preference has a factual foundation as solid as a pit of quicksand. None of the anti-discrimination legislation requires or permits preference. What the laws do require is an end to the preference we have always given--preference for whites, preference for males, preference for the sons of the rich. These laws simply mandate an end to preference, not a new kind of preference.

By the way, HEW has finally (in October, 1972), officially published the Higher Education Guidelines for Executive Order 11246 which has been in effect since October, 1968.

Title VII of the Civil Rights Act of 1964 was amended in March, 1972 to include educational institutions. It forbids discrimination in employment and applies to all educational institutions, whether or not they receive federal aid.

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC), which is appointed by the President. Like the Executive Order 11246, individual charges can be filed as well as charges of a pattern of discrimination.

Unlike Executive Order 11246, no affirmative action is required; employers are required merely to not discriminate in employment. A conciliation agreement or court order may require affirmative action but this would be after charges are filed. The Executive Order, in contrast, requires affirmative action plans of all contractors with contracts of $50,000 and 50 employees, regardless of whether or not charges have been filed. Under the Executive Order, reviews can be conducted without charges being filed; indeed, if a contract is a million dollars or more, there must be a review before it is awarded. Under Title VII, on the other

hand, generally there are no investigations unless charges have been filed.

Should conciliation fail, the Equal Employment Opportunity Commission can take an employer to court. This is a new provision which strengthens EEOC's hand. It ought to speed up the conciliation process considerably. Currently, EEOC has a huge backlog, and it can sometimes take a year or two before an investigation is even started. (Unfortunately, HEW is similarly backlogged.)

Women's groups are calling for a strategy of swamping EEOC as well as HEW with complaints in order to force attention on sex discrimination as well as providing a justification for larger budgets.

In some ways EEOC's guidelines issued April 5, 1972, call for stronger provisions that those required by HEW. For example, EEOC requires that the part of maternity leave where a woman is temporarily disabled and cannot work for medical reasons (i.e., childbirth and complications of pregnancy in contrast to childrearing) must be treated like any other temporary disability such as heart attack, gall bladder or prostate surgery. The same guidelines call for equal benefits, including retirement benefits. The Teachers Insurance and Annuity Association (TIAA) retirement plans which many institutions subscribe to will now have to give women the same monthly retirement benefit as men who have

identical contributions. The American Nurses' Association has filed charges under Title VII against the University of Iowa, the Wayne State Board of Governors, and Case Western Reserve University because of their participation in the TIAA-College Retirement Equities Fund (CREF) plan (which pays women lower monthly benefits than men with identical salary records and work histories). Similarly, the National Organization for Women has filed a class action suit against the University of Michigan for their participation in TIAA-CREF.

In the Education Amendments Title VII of 1972, effective July, 1972 is a little noted section that extends coverage of the Equal Pay Act of 1963 to executive, administrative, and professional employees, including all faculty.

The question many people ask is, if unequal pay on the basis of sex is already forbidden by the Executive Order and by Title VII, why is the Equal Pay Act so important?

It's important not because it does something different, but because it does what it does in a different way. It is enforced by the Wage and Hour Divison of the Employment Standards Administration of the Department of Labor. Like the Executive Order, but unlike Title VII, reviews can be conducted without complaints having been filed. The Equal Pay Act was the first sex discrimination legislation enacted and it has been successful in getting women millions of dollars in back pay.

One of the major advantages of the Equal Pay Act is that the complaint procedure is very informal. Unlike Title VII which requires a sworn complaint, the Wage and Hour Division will investigate an establishment on the basis of a letter or even a telephone call. Unlike Title VII and the Executive Order, where the individual complainant's name is generally revealed to the employer, the complainant's name is not revealed to the employer under the Equal Pay Act. In fact, an employer may not even know that his establishment has been reported to be in violation of the statute. Reviews can be conducted whether or not a complaint has been reported. Moreover, when a review is conducted, it is almost always of the entire establishment. (Occasionally this is true of EEOC investigations, and of course it is true of pattern complaints under HEW.) After a review is conducted, if a violation is found, the employer may be asked to settle on the spot--i.e., raise the wages of the underpaid workers and pay back pay to them (the statute of limitations is two years for a non-willful violation, three years for a willful violation). Should the employer refuse, the Department of Labor can go to court. In the past, 95% of the cases were settled without recourse to litigation. Often employers settled not only because they are clearly in violation of the law, but in addition, court cases involve public disclosure of the findings; if the case is settled without litigation, the institution's name is not revealed publicly.

Currently, there is virtually no backlog in equal pay cases, although this is expected to change as word gets out to academic women.

The application of Equal Pay and Title VII to faculty is, of course, very new. We can expect women to file under Equal Pay, Title VII and the Executive Order, and Title IX of the Education Amendments simultaneously. At this point, under the Executive Order, the number of sex discrimination complaints against universities and colleges exceeds those filed by all the minorities put together.

I would like to quickly outline some of the decisions and principles which have been upheld in the courts.

*The intent to discriminate is irrelevant. The effect of a policy is what counts.

*Statistics can be used as prima facie evidence of discrimination. The courts have not hesitated to use statistics as a measure of compliance and of discrimination.

*Motherhood is not a rational basis for exclusion. Marital status is also irrevelant in employment decisions.

*Numerical goals and timetables have been upheld in the courts as a means of redressing past discrimination.

*Employers have the duty and obligation of fair recruitment. Word-of-mouth recruitment can be illegal when it excludes a large portion of the qualified pool--women and minorities.

*All hiring and promotion policies must be based on objective, job-related criteria.

*Professional employment, though more complex than non-professional employment, is not exempt from these requirements.

*Any policy that has an adverse or disparate effect on women and minorities and that cannot be justified by business necessity is, under law, discriminatory. Nepotism, age requirements, restrictions on part-time employment and studies will come under increasing scrutiny under this doctrine.

*Back Pay is authorized under the new legislation, and numerous institutions have made "equity adjustments" totaling hundreds of thousands of dollars, with some women receiving increases of $5,000-10,000. Similarly, attorney's fees are authorized under Title VII and have been awarded in at least one HEW case.

*Seniority systems, such as tenure, may well come under review if they have the effect of perpetuating past discrimination. None of the laws prohibit bona fide seniority or merit systems.

Although legislation prohibiting sex discrimination against students is perhaps less well known than the employment legislation, it may well have an equally profound impact on educational institutions.

When the Public Health Service Act was amended by the Comprehensive Health Manpower Training Act and the Nurse Training Amendments Act in November 1971, it became the first law forbidding discrimination against students on the basis of sex. It forbids discriminatory admissions to all schools training for the health professions, including schools of medicine, veterinary medicine, pharmacy, optometry, dentistry, nursing, as well as other health training programs such as medical technician, X-Ray technician.

Concerning students, the Education Amendment of 1972 (Higher Education Act) is far more extensive. Its basic provision is:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

These sex discrimination provisions are patterned after Title VI of the Civil Rights Act which forbids discrimination on the basis of race, color and national origin in all federally assisted programs.

All educational institutions, preschools, elementary and secondary schools, as well as colleges and universities, that receive federal monies, whether public or private, are covered. There is an admissions exemption for private

undergraduate colleges (as well as single sex public undergraduate institutions), but those institutions are not exempt from the prohibitions forbidding discrimination against students because of sex once they are admitted.

For example, Dartmouth can have a quota on women undergraduates--but not graduate students--but once students are admitted they must be treated equitably, regardless of sex. Discrimination in admissions is specifically prohibited in all vocational institutions, all professional and all graduate institutions, as well as all public undergraduate co-educational institutions. The act will provide women students with a tool to combat discriminatory practices in student housing, athletics and sports, textbooks and curriculum, financial aid, student rules, single sex honorary societies and so forth. Under Title IX, individuals and organizations can challenge any discriminatory practice in a federal program or activity by writing the Secretary of HEW.

As the women's movement gains momentum, we will see the emergence of women as the fastest growing and potentially the largest advocacy group on the campus. Women and minorities together are evaluating virtually the entire structure of the academic community. Administrators would be wise to utilize the pressure from women and minority groups as a lever for meaningful change on the campus. Offering equality of opportunity for all groups can be a

real vehicle for constructive change, innovation, and growth.

We will also see increasing backlash and resistance to change. The women's movement threatens many because it affects all of us. Many men are consciously or unconsciously concerned about their relationship to their wives. The women's movement is threatening because there is literally one of us in every house. We are wife and husband, sister and brother, mother and son, daughter and father. We cannot escape each other, nor do we wish to do so.

Change will come--it must come. Barriers will be toppled and hurdled and doors will be opened. Today women want--and deserve--an equal chance to walk through the front door of higher education--a door which has too long been wedged so tightly shut that only a few hearty and exceptional women have managed to squeeze through it. The day may yet come when the mediocre woman can go as far--and as fast--as the mediocre man. The day may yet come when a college educated woman is not first asked: "But can you type?"

SOME EXTRA LEGAL CONCERNS

by

Marjorie Knowles

Margaret Dunkle has done such a complete job in describing the law on the issue before us, that I would like to make some nonlegal points.

First of all, with reference to the number of men in home economics, in higher education we are at the end of a very long pipeline, the educational system in our country. As people in our society go through that pipeline, they are invariably socialized into stereotyped sex roles. There are not very many boys who have as role models home economists; there are not many girls who know that there are options for them in medicine, the law, or engineering. They are taught at a very young age what is and what is not ladylike, what men do and do not do.

It seems to me that those of us involved in higher education have some obligation to see that what may be our best talent is not routed away from us when people are much, much younger and have so many options foreclosed to them because of rigid ideas of sex role sterotyping. We need to be very aware of the fact that people are socialized into sex roles from the beginning of their education; department

chairpeople who are faced with having to look around to see what women they can hire for their physics department, for example, are really suffering from being at the end of this long pipeline.

The second point I would make concerns the possible ramifications that affirmative action plans can have for universities. I think it's a very good suggestion to use the development of these plans as an opportunity to make some much-needed, meaningful changes within institutions. One example would be the opening of opportunities for people who have previously not been able to avail themselves of the services of an institution of higher learning. We need to consider the options that are open to "the non-traditional student." Many, if not most, of these older, more mature students are women. We need to look at our universities again to see how students' perceived needs are served. Affirmative action plans will lead us to examine our programs in many such new lights.

I was interested to see that Revised Order No. 4 discusses some fairly far-reaching problems, including child care, housing and transportation. If people don't have access to these, they clearly cannot take jobs in a certain setting. More and more we are beginning to think of a university as being involved in these areas, perhaps not so much transportation, but clearly child care and

adequate housing are matters to which university administrators have to turn their attention. Another area of concern is that of guidance and counseling. In this vital field we need to make sure that we are not perpetuating the sex role stereotyping which our students have undergone for so long, and that, indeed, we take affirmative action to see that in our guidance and counseling we try to undercut rigid socialization to make people see the options open them as individual human beings.

The third point I would make concerns compliance with the demands of these laws. As Margaret Dunkle's very good outline makes clear, the law now out-laws discrimination on the basis of sex in higher education, and even more, demands some affirmative action to be taken. There can be no doubt about that fact. It seems to me that administrators have two courses open to them. One is to be dragged into compliance with the laws, kicking and screaming, or do what the law demands. I would, of course, much prefer the latter course, partly because I very much distrust anything, affirmative action plans or any kind of arrangements, which are arrived at under the gun. I don't think we need face the situation which faced Columbia University when the government held up $13 million in grants until it showed some affirmative action. It is much better to go about these things in a thoughtful, careful manner before they reach crisis proportions.

I would hope that that is the way compliance would come about in the institutions that you are associated with. The law is on the books, passed by the Congress of the United States. There is no getting away from that fact. It seems to me that compliance by educators should be easier than compliance by almost anyone else because compliance, which calls for fundamental fairness, is only a matter of what's right and, more significantly for us, accords with what I think are true values of education: judging individuals on their merit, rewarding excellence in scholarship, service, and teaching. That is what the law demands. Those rewards now have to be given without regard to race or sex. And that seems to me to be a value which educators prize and for which they have fought.

THE OUTLOOK FOR FACULTY BARGAINING

by

Richard Thigpen

I am pleased to have this opportunity to meet with you and to share some thoughts on the current legal trends and outlook for faculty bargaining in our nation's colleges and universities. Ironically, had I been addressing you on this same subject ten years ago, it would have been unheard of to speak of universities conducting their faculty relations through techniques traditionally associated with industrial bargaining. However, the role of faculty unions and collective bargaining are now among the most current of topics in higher education, occupying a dominant place in conferences such as this and in the meetings of all the major educational associations. Moreover, there is every indication that the laws governing colleges and universities, both in the public and private sector, are reaching a point where educational labor relations eventually may be interpreted in the same "legal" context as are labor relations in the industrial sector.

In approaching this subject there are two things which I need to make clear from the outset. First of all, when I speak of faculty bargaining, I am not speaking of

bargaining in the sense of internal institutional negotiations among faculty and students, administration and faculty. Bargaining in this sense is not a new phenomenon, nor is it ever likely to fade completely from the scene. Instead, I will be referring to the organization of faculty into unions, for formal negotiations, under permissive state or federal legislation.

Secondly, I would note that there exists a major distinction in the labor laws governing public and private institutions. As I will point out later, this is especially noteworthy since under recent decisions private institutions of learning have been brought under the same federal laws that have governed bargaining in the industrial sector. The public situation, while perhaps of more interest, offers a considerably different picture.

Changing Concepts of the University and its Faculty

Though I have been asked to deal primarily with legal trends, I think we all recognize that laws are in some sense reflective of prevailing societal attitudes at any given point in time. For this reason, I think it helpful to review some of the major changes in the public's view of higher education and the faculty relationship over the past two decades.

The Era of "Professionalism"

Basically, we have seen three different concepts or models for higher education during this period. The original concept which governed our colleges and universities was one of "professionalism." This was largely a reflection of the historic role and perception of higher education, and education governing the relationship of the college faculty into the mid 1960's. Under this concept,the institution of higher learning was considered a "professional" community, isolated from public review and (in academic matters) generally answerable to itself. It was highly unusual for the public to intervene (through the legislature, a governing board, or the college administration) in any aspect of academic policy, whether it be curriculum, teaching quality, course evaluation, admissions, or a host of other related matters. And internally, these matters were the province of the college faculty. College presidents in this period made their reputations by raising funds and building fine facilities; few were champions of academic reform.

In a sense, this "professionalism" of the college faculty was much like the in loco parentis concept which governed the student relationship for so many years. Both concepts served to insulate the institution from external regulation. Neither, however, had any real existence, in a legal sense. There was no "legal" obligation, for example,

for the public to ignore a curriculum which it considered unresponsive to current needs; nor was there any "legal" obligation not to intervene in such matters as teaching loads, faculty evaluation, or even academic freedom. The deference shown the college faculty in these matters was a reflection of the prevailing public attitude, and that attitude through the early '60's was one of viewing the academic community as a "professional" community, responsible largely to itself.

It is not hard to see why we had little or no faculty unionization during this period. Generally, faculty controlled the matters which were closest to them, and even when times were bad, in an economic sense, the unhappiness was not sufficient to move them toward an "industrial" labor model, which they considered repugnant to their basic beliefs. Faculty thought of themselves as "professionals" in every sense of the word.

I might add that, in my view, it was this sense of "professionalism," rather than any real feeling that they were participating in institutional "management," that deterred faculty from unionization during this period. While the faculty did in fact have major influence in many areas of academic policy, I doubt they ever really thought of themselves as partners in the "administrative-management" process of the institutions. That feeling of disaffection

and conflict with college administration, which seems so much in evidence today, probably extends back to the time when the first collegial community was established.

The Shift Towards "Legalism"

In the mid 1960's, a gradual change began to take place in the relationship of the faculty to the institution. This resulted from many factors, not the least of which was the student ferment that swept the country and extended into the early 1970's. The spectre of buildings burning and being occupied, of campus riots and demonstrations, led the public to distrust institutional leadership and to think that decisions might not always be "correct" just because they were made by "professionals" in the academic community. This public distrust evidenced itself most dramatically in a near-universal moratorium on new state funds for education and an avalanche of legislation purporting to govern the conduct and working conditions of those in the academic community.

The reaction on the college campus was predictable. College presidents, seeing their major job as holding the institution together, looked increasingly to the law and legal protections in all matters affecting the academic community. Students, at the same time, rejected the protective in loco parentis concept, demanding to be treated

as "citizens" and as equals under the law. Inevitably, faculty too began to look to the law for their protections, and we saw the emergence for the first time of an "employer-employee" concept of the faculty relationship.

The logical result of this new "legalism," and of the employer-employee concept, was a movement towards unionization among the college faculties over the nation. Although the organizational activities first took hold in community and junior colleges, they spread rapidly into the senior institutions, especially those on the East Coast and in the Midwest which had been so heavily affected by turmoil and unrest. As early as 1970, for example, it was reported that collective bargaining agreements existed for about 10,500 full-time, tenured and non-tenured faculty members of the State University of New York, covering 17 campuses. A survey made that same year showed that, when 70,477 faculty members were asked their opinion of the statement: "Collective bargaining by faculty members has no place in a college or university," only 18% agreed strongly, 23% agreed with reservation, 35% disagreed with reservation, and 24% disagreed strongly.[1] In other words, some 59% of those surveyed in 1970 believed that collective bargaining by faculty members had at least some proper role in the college or university. I might add that, in the three years since that survey was made, faculty unionization has increased to the point where, this past

spring, some 60 four-year colleges had elected official bargaining units.[2]

The New "Consumerism"

Over those same three years, however, another change has been taking place in higher education, which seems to be subtly affecting the character of faculty relationships. That change is not in the direction (back) towards "professionalism," though it is characterized by a new confidence in institutions and a lessening of the tensions which brought us into the present era. It is, instead, a movement towards "consumerism" in higher education, towards a concept where institutions are held accountable for their "practical" outputs and are expected to be responsive to changing student learning needs. As Harvey Goodfriend at San Diego State University recently wrote:

> They [institutions] no longer can pretend to be communities of scholars and cloistered citadels for truth-seekers. Because they have accepted massive infusions of public dollars to feed explosive growth and have assumed certification responsibility for virtually every white collar occupation, these institutions must forego their right to many traditional privileges and immunities. They have [in Goodfriend's words] become a new form of public utility.[3]

If Goodfriend is right, we could well see a retreat from the "legalistic" employer-employee concept of faculty relations to a relationship of "trust," more characteristic

of the public utilities, to which he refers. And while faculty unionization may have been a logical result of the "legalistic" approach, it may not be a necessary conclusion in this new era of consumer-oriented education. True, we may never return to a situation where faculty are independent "professionals," exercising unquestioned influence in academic matters. But much of the intrusion which disturbed faculty in the late 1960's, and led to unionization, has now passed, and I believe they once again have the opportunity to pursue their work, with security and renewed public trust. It is interesting to note in this regard that the surge of interest in faculty collective bargaining during the last three years has dropped off. The Chronicle of Higher Education reported this April with some surprise that"only eleven four-year institutions voted in favor of collective bargaining this past academic year, and that five institutions rejected it."[4]

Present State of the Law on Faculty Bargaining

With the backdrop of this new "consumerism" I now want to offer a few observations on the strictly "legal" aspects of faculty bargaining.

Federal Jurisdiction. First, I would like to call attention to the federal laws governing faculty bargaining, both in the public and private sector.

Federal laws in the labor field include (1) the National Labor Relations Act of 1935, (2) the Labor Management Relations Act of 1947 (better known as the Taft-Hartley Act), and (3) the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act). Federal jurisdiction under all these statutes is based on the interstate commerce clause of the U.S. Constitution.

Though none of the acts refer to or even mention colleges and universities, the question has been presented to the National Labor Relations Board (NLRB) on numerous occasions. In 1951, for example, a union petitioned the NLRB for certification as the bargaining representative of clerical employees in the libraries of Columbia University. At that time, the NLRB declined jurisdiction, on grounds that private educational institutions were not involved in interstate commerce. Under this doctrine, the NLRB consistently declined jurisdiction over labor disputes at any private, non-profit-educational institutions.

In June of 1970, however, the NLRB reversed its earlier position on the Columbia doctrine in a landmark decision involving Cornell and Syracuse Universities. In that decision the Board held that private colleges and universities could be considered in interstate commerce if they had annual gross revenues of a million dollars. The Board indicated that, in support of federal jurisdiction,

it would look at a large number of factors having impact on commerce, including the number of out-of-state students, income from tuition, purchases for food, services, equipment, books, sale of college publications, and amount of college endowment.

Though the Cornell decision paved the way for unionization of faculties at private institutions, the National Labor Relations Act explicitly excludes any "public" employer from its jurisdiction. This includes state colleges and universities, such as The University of Alabama, as well as any other municipal, county, or state agency.

Still, there has been considerable agitation for legislation to repeal this exemption, especially during the recent period of "legalism" in higher education. In the last session of Congress, for example, three separate bills to extend federal jurisdiction were introduced, though all died in committee. One of the bills (H.R. 12532)[5] has been reintroduced (H.R. 579)[6] in the current (93rd) session of Congress, though it differs from previous legislation in that it would place public employers under a new board, separate from the NLRB. The bill is in subcommittee, and there has been no official request for public hearings on it at the present time. Should it become law, though, it would have a major impact on public instrumentalities over

the nation and certainly would create a legal environment permissive to faculty bargaining.

State Laws. On the state and local scene, several states have enacted their own versions of the Taft-Hartley Act to cover employees in the private sector. As of 1971, seventeen states had enacted labor relations laws governing the bargaining rights of private sector employees, and in eight states, the legislation expressly covered employees of private educational institutions. In the remaining 42 states, private colleges and universities have failed to meet the NLRB's federal jurisdictional standards, and thus have no statutory sanctions for adjudication of faculty labor relations.

In the public sector, however, the situation differs considerably. As of 1971, some 29 states had enacted public employee collective bargaining laws, and in only 8 of these states did the legislation exclude employees of state institutions of learning. Among those states that have public employee statutes governing colleges and universities, there is little consistency in the type of protection or control provided. The one notable departure seems to be in the matter of strikes where, with the exception of Hawaii and Pennsylvania, the states, either by statute or judicial law, have restricted any form of public employee strikes. In the absence of federal standards, it appears that various

states tend to adopt widely varying approaches in the implementation of their public employee statutes in regard to higher education. For example, New York and New Jersey have taken markedly different approaches to an appropriate unit for their statewide universities, New York using a statewide unit while New Jersey chose separate units at the six state colleges.

The Alabama Situation

In our own state, though, there currently is no legislative or judicial authority which, in a general sense, could be construed as permissive to public employee organization. Union activities by employees of governmental instrumentalities have, from the very beginning, encountered considerable legal resistance in Alabama. In 1940, for example, when the Congress of Industrial Organizations(CIO) appeared to be encroaching into the public sector, the legislature immediately adopted a resolution in which it "viewed with grave concern and disfavor" the efforts to organize state employees. In later years there were a series of attorney general's opinions dealing with the power of state agencies in handling problems involving labor unions, which also expressed distrust. On December 3, 1946, an opinion was issued indicating that the "University of Alabama and any branch thereof has no authority to enter into a contract with a labor union, recognizing such union

as the bargaining agency for University employees. The University of Alabama may require that its employees not belong to a labor union either as a condition preceding or subsequent to the condition of their employment."[7]

Legislative action followed several years later. In August, 1953 it was declared to be the public policy that "tne right of persons to work should not be abridged or denied on account of membership in any labor union or labor organization,"[8] and that "no person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."[9] Several weeks later, however, the state adopted an exception to this broad rule, by approving a statute that provided that "any public employee who joins or participates in a labor union or who remains a member of, or continues to participate in, a labor union organization . . . shall forfeit all rights afforded . . . as a result of his public employment."[10] This is the now-famous Solomon Act.

Interestingly enough, the situation in regard to faculty under the Act is different from that applied to other employees, in that college teachers are expressly excluded from its provisions. Those provisions, however, deal primarily with union membership, not bargaining, and the weight of law in the country is to the effect that

state agencies have no authorization to bargain collectively, in the absence of some permissive legislation. To do so is to dislodge a responsibility specifically delegated to the governing board or agency.

This situation could well be altered by a bill now under consideration in the Alabama legislature. Under that bill, all public employees, including the college faculty, would be given the right to organize and bargain collectively. While the right to strike would be expressly prohibited, the act would afford college faculties basically the same rights and prerogatives provided under Taft-Hartley and other federal labor relations laws.

The Predictable Problems of Bargaining

In the event that this bill passes, or that we do eventually have some permissive labor legislation in Alabama, there are a host of problems to be anticipated.

First, who is management? Is it the state legislature, the state coordinating board, the boards of trustees, or the individual college presidents? The problem is compounded when you consider who is classed as "management" within the institution. Is management confined to the chief administrative officers, or does it extend on down the supervisory structure to the academic department heads? The latter point has occasioned considerable controversy, and is

complicated by a recent NLRB decision that department heads are essentially part of the "labor" force and not supervisory. Other cases decided by the NLRB have achieved different results, but in every case, the distinction has been drawn on whether there is actual "managerial" responsibility.

Second, what is the appropriate bargaining unit for labor? For example, are law professors to be in one bargaining unit and English professors in another? Should there be distinctions between undergraduate, graduate, and professional school faculty? Should librarians and counselors be included in the faculty unit?

Third, who is organized labor? Is it the American Federation of Teachers (AFT), the National Education Association (NEA), the American Association of University Professors (AAUP), the state education association, or some other group? Although the AFT appears to be the most active, the NEA has captured the lead in a number of campuses, with somewhere near 105 chapters. The AFT follows with 63 and the AAUP with 21. The race is closer when one looks only at the four-year institutions represented by each union: AFT, 18; AAUP 8, NEA, 18.[11] This situation will be further compounded if NEA adopts the proposal made at its recent convention for a merger with AFT.

Fourth, what about the problem of public agencies committing resources which they do not yet have? In the private sector, management may have the capacity to commit resources at a bargaining table, but neither a college administration nor a governing board can make such commitments against a state legislature, especially when that legislature may not meet but every two years and is just as likely to cut budgets as to raise them.

Fifth, what happens to the institution when one begins to draw lines between management and labor? According to the lead article in the July 2, 1973 Chronicle of Higher Education, the results have already proved unsettling in many colleges over the country. After all, if a faculty's relationship is purely that of "labor," is it not logical that management will want to withdraw all policy making delegated to faculty and subject it to the bargaining process? Obviously, such an approach could mean considerable restructuring of the internal operations of higher education at all levels.

Sixth, what effect will bargaining have on tenure? Tenure, in its most basic sense, is a guarantee of job security for college faculty. Yet, in the industrial bargaining context, job security is protected by a collective bargaining contract. Thus, if one moves to a labor

union model, is it not logical that the contract would replace tenure as a guarantee of job security?

Seventh, there is the very practical consequence that collective bargaining will necessitate a large growth of specialized staff and supporting resources. Ironically and perhaps paradoxically, the build-up of administrative staff has always been a source of faculty cynicism over college management. Nevertheless, it is an inevitable result of formal bargaining procedures.

Conclusion

It seems probable that faculty collective bargaining will result in major changes in our institutions of higher learning. From a strictly legal standpoint it seems equally probable that the laws in our country will become increasingly permissive towards bargaining by public employees. Indeed, the law already sanctions bargaining by employees in private institutions of learning.

Whether college faculties will embrace those new legal techniques remains to be seen. Certainly, in an era of "legalism," where faculty felt no protections other than those of the average "state" employee, unionization was a predictable response.

However, there is some indication that the higher education scene, nationally, is changing. There seems to

be a movement away from the legalism of recent years towards a new consumerism in higher education. Some have predicted that this too will lead to unionization of college faculties. Yet if the faculty discontent of the late 1960's was rooted in something other than economics, then other responses are predictable.

As far as "bargaining" is concerned, I think we will continue to have it, in the sense of faculty negotiating with administration and students with faculty. As I stated before, the governance question is not a new issue in higher education, nor is it likely to be resolved in the near future.

But collective bargaining, through formal labor organizations, will depend almost exclusively on the faculty's response to the new "consumerism" in higher education. Frankly, I am not altogether certain which form the faculty response will take. But I do believe their options are still open.

FOOTNOTES

1. See Carnegie Commission on Higher Education, Governance of Higher Education (McGraw-Hill, 1973), p. 91.
2. See Chronicle of Higher Education, April 20, 1973, p. 4.
3. Harvey J. Goodfriend, "The University as a Public Utility," Change Magazine, March, 1973, p. 9.
4. Chronicle of Higher Education, April 30, 1973, p. 1.
5. H.R. 12532, 92nd Congress, 2nd Session (1972).
6. H.R. 579, 93rd Congress, 1st Session (1973).
7. 45th Alabama Attorney General Report 19 (1946).
8. Alabama Code, Title 26, Section 375(1), (1958).
9. Alabama Code, Title 26, Section 375(4), (1958).
10. Alabama Code, Title 55, Section 317(2), (1958).
11. Chronicle of Higher Education, April 30, 1973, p. 4.

FACULTY COLLECTIVE BARGAINING: AN INDUSTRIAL RELATIONS APPROACH

by

Joan North

A recent publication from the American Council on Education identifies three prior conditions for any group deciding to engage in collective bargaining. These are:

1. the law must establish the right of the group to require their employer to bargain with them;
2. there must be a substantial measure of dissatisfaction with existing conditions of employment; and
3. an individual or a group must be making positive efforts to "organize" the work force.[1]

My remarks are directed at the second of these conditions, the substantial measure of dissatisfaction, since I believe there is a danger of becoming too preoccupied with the first precondition, the strictly legal possibilities on the one hand, or with the third, the personalities involved in organizing the personnel.

The legal framework is, of course, essential knowledge, but that knowledge alone did little to solve

the recurring problems several years ago involving the "illegal" striking of public school teachers. In addition, the application of federal legislation to colleges and universities and the emergence of similar state legislation has been so recent a phenomenon, and such a patchwork one at that, that there is actually very little law to rely on, and very little interpretation of the laws as they apply to educational institutions. Even the growing case law from the National Labor Relations Board (NLRB) and state public employee relations agencies does not offer many across-the-board rulings. The one overriding fact that I have gleaned from reviewing NLRB cases is that the NLRB is as confused about university governance as we are ourselves. And so let me address what appears to be the "substantial dissatisfactions" which contribute to unionization and the evidence we have so far on the effect of collective bargaining on these dissatisfactions.

While there are any number of specific problems perceived by faculty to be solvable by collective bargaining, major categories can be summarized as: (1) dissatisfaction with compensation; (2) dissatisfaction with the governance system; (3) proximity to institutions engaging in collective bargaining; and (4) faculty uncertainty over the growing student role in governance.[2]

Let me expand somewhat on the first two dissatisfactions. The faculty compensation issue is a little more complicated than Samuel Gompers' early view of union aims, "More!" The faculty compensation package may be perceived as a comparison problem, either externally or internally. Compensation may be low compared to other state universities, or to other colleges in the state or, as in the case of the highly paid City University of New York (CUNY) faculty, in comparison with the local public school teachers. One set of favorable comparisons may not alleviate the faculty's perception that they are keeping up with the academic Joneses; indeed, there may be several Jones families. A more subtle salary dissatisfaction occurs with internal distribution of funds. The faculty in the traditionally lower paid areas, usually the humanities, see unionization as a method of leveling the salary gap between themselves and the faculty in the professional areas of business and law. In addition to the departmental salary differential, there may be differentials by rank which are perceived as unfair by those on the lower end of the scale.

In the early stages of the collective bargaining movement, before Earl Cheit informed us that we were in a financial crunch, the expert opinion was that unionized faculties were more concerned with internal governance than with money. However, with the money and job markets

tightening, that opinion is probably outdated. In any case, the monetary advantage that unionized faculties may have gained over non-unionized faculties is not easily documented. Among the two-year colleges, collective bargaining is considered responsible for significant gains in compensation, but no such definitive statement can be made for four-year institutions. It is difficult to tell, for example, whether some faculty raises were due to collective bargaining or if they would have occurred in any event. Furthermore, a mixed pattern has emerged in evaluating the monetary success of collective bargaining at four-year institutions: some faculty seem to be making significant gains while other are not. These factors, coupled with the problems of measuring economic gains other than salary (medical and insurance benefits, child care and sabbatical provisions), have so far thwarted attempts to evaluate adequately the economic benefits of collective bargaining to four-year institution faculties.

A long-range complication to assessing collective bargaining's impact on faculty salaries is the probability that increases in salaries will be offset by increases in faculty work load. This "productivity" strategy, long used in the industrial sector, is certain to come into play in academic negotiations, especially as legislatures continue to rally around the concept. The CUNY negotiations are

grappling with this issue now, and it will be interesting to watch the long effects of the issue there.

As for more equitable internal salaries, evidence so far has not yet shown dramatic leveling of salary differentials among divisions, but experts continue to predict it as a logical outcome of majority rule in collective bargaining units where the higher paid faculty are outnumbered.

In regard to the relative gain of power within the governance system, there is no doubt that some faculty gains have been achieved, especially where faculty had little or no prior power. But the power relationships of other constituencies of the institutions are also fluctuating. Although campus power is not a zero sum proposition, where one person's loss is another's gain, it is obvious and inevitable that a shift to faculty collective bargaining precipitates shifts in the stance of other power blocks.

Collective bargaining will expand the operational role of the institution's governing board. Because collective bargaining contracts must usually be ratified by the governing board, and because that contract usually contains very detailed aspects of the institution's internal affairs, the board is forced to concern itself with administrative and faculty matters which might have been formerly

delegated. In addition, the board is frequently identified as a final appeal level in the contractual grievance system, a situation which brings the board into the details of the business of the academic community.

Another group whose authority position will be shifting is the administration. This change in posture is exemplified by the growing number of collective bargaining contracts in which management-rights clauses are found. Although management-rights clauses, which simply reaffirm management's rights to decide anything not covered in the contract, are common in industrial contracts, their emergence in academic contracts signifies a more militant administration. Another, although so far less significant, manifestation of administration attempting to consolidate (or define) their own power is the recent creation of two quasi-unions for administrators, the American Association of University Administrators and the Academy for Academic Personnel Administrators.

A third group sure to reassess their influence after the faculty unionizes is the students. Collective bargaining so far has had only limited effect on student power; however, at the institutions where student power is diminished by faculty collective bargaining, the students will undoubtedly seek new methods of influence. Already a student group in New York is forming a student "union" to protect its interests,

and at several institutions students sit as observers in the collective bargaining negotiations.

The fourth shift in authority as a consequence of collective bargaining occurs in the relationship of outside agencies and individuals to internal decision making. Collective bargaining allows or necessitates institutional decisions formerly made by the faculty and/or administrators to be determined externally.

The insertion of external agents into the institution's decision making process basically reduces the institution's autonomy, which in turn entails a reduction in faculty autonomy. Some examples of this type of power shift would be determined by the type of collective bargaining unit involved, the contract provision for outside arbitration, and unfair labor practice charges. If any institution's faculty is grouped into a unit which encompasses several campuses within a university, the faculty may find that decisions formerly made on campus are now negotiated with the Chancellor or at the Board level. Indeed, some units, especially statewide ones, may bargain completely outside the university, with the Governor's Office or some state-wide agency, as in New York and Hawaii. The use of outside arbitrators to handle either contract impasses or grievance appeals again removes the action from the internal decision making arena. Unfair

labor practice charges remove institutional decisions and processes into either the NLRB or a similar state agency. Although there have been few of these charges so far at educational institutions (and these generally involve dismissed faculty members charging that their dismissal was due to union activities), the high number of these charges in the industrial sector (2,000 in a recent year were filed with the NLRB)[3] implies that this resort to external authorities may be a major phenomenon in the future of higher education.

Let me suggest that, although a faculty or administration engaged in or considering collective bargaining must be knowledgeable about the legal parameters of this process, there are, from a personnel point of view, more basic foci, namely the people and the problems. And so, I would like to suggest that, instead of turning the issue over to a cadre of labor lawyers at the outset, there are two rather basic steps which should be initiated.

First, find out what are the problems which collective bargaining is supposed to solve. The problems themselves are, after all, the real focus. It is probably wise to keep in mind the difference between perceptual and real problems. Without getting into phenomenological distinctions, let me say that the person who thinks he or she has a problem, has one, just as surely as if a Certified Public Accountant

(CPA) certified it. Nonetheless, a distinction can be made between problems of perception in which the situation can be resolved by better, or more, or less information, and real problems on the other hand. The latter are a little more difficult to solve because the eradication of the problem will probably involve some restructuring of priorities which may or may not be desired by the administration. In any case, knowing about the problem, even if you can't or don't solve it, is certainly no waste.

Secondly, encourage the faculty, preferably a faculty group, to investigate the forms, issues, local conditions, and implications suggested by a collective bargaining form of governance. It will not suffice for the administration to do this, since they too easily become "doomsdayers" and are naturally somewhat suspect in this situation.

Finally, lest you have become unduly discouraged by today's presentation of higher education as pitted into many adversary relationships and governed by vague laws and many constituencies, let me paraphrase John Kennedy's analysis of a similar situation at the level of the Federal government: when things are well coordinated and running smoothly and happily, that is a sure sign that nothing very significant is happening.

FOOTNOTES

1. Robert K. Carr and Daniel K. VanEyck, Collective Bargaining Comes to the Campus (Washington, D.C.: American Council of Education, 1973), p. 67.

2. Ibid., see chapter three, "Faculty Dissatisfaction as as Cause of Collective Bargaining."

3. Ibid., p. 286.

THE COURTS AND ACADEMIC AFFAIRS

by

Parker Young

One of the most revolutionary developments in higher education in recent years has been the influence of court decisions. Since the landmark Dixon[1] case in 1961, there has been a proliferation of court cases which have great effect upon the daily decisions which academic administrators must make. Gone are the days of in loco parentis when the dean could simply tell a student to pack up and leave since his conduct was not the kind befitting a student at that college. And if any notion of in loco parentis still persists today, then I think the latest amendment to the Federal Constitution giving the right to vote to 18-year-olds in both state and federal elections, as well as various state legislative moves toward lowering the age of majority to 18, should sufficiently lay to rest such a contention.

I believe the demise of in loco parentis is not entirely unwelcome by many educators, for I doubt if many of us would really like to accept some of the responsibilities which attach to that doctrine.

Legal adult status is now accorded to those under 21 in a plurality of states, and the trend in this direction is continuing. Instead of the majority of students being minors, many colleges are now filled with practically all adult students, and it is reasonable to say that almost all aspects of higher education may be affected either directly or indirectly by this change. Some ramifications of this development include a lessening of remaining *in loco parentis* applications, residency as related to out-of-state tuition, dormitory residency requirements, student records, student financial support, and tort liability. This field is now fertile for judicial cultivation, and the courts are already hearing cases which will dramatically affect higher education.

In addition to the relationships between students and the institution, court decisions have now affected every facet of higher education, so that today it is absolutely imperative that the professor and academic administrator have some knowledge of the legal parameters within which he or she may act.

During the past decade, we have heard much concerning campus rights. It has been argued that surely in the academic world, of all places, the rights of individuals must be respected. And the courts have declared that no one sheds his constitutional rights when he enters the

campus gates, nor does he acquire any special privileges.[2]

Although our courts are not anxious to become college administrators or professors and handle every act of disobedience and disruption on campus, I would point out that the closer a college or university rule or action taken comes to infringing upon basic constitutional rights, the more justification must be had for the rule or action taken pursuant to the rule.

Colleges and universities have an inherent authority to maintain order and freedom on campus.[3] They also have the responsibility to provide for the health, safety, and welfare of all on campus. Inevitably, the courts are called upon to determine the rights and responsibilities of both parties as they attempt to preserve that delicate balance between the rights of the individual and those of the institution and of society at large.

Since the Dixon case in 1961, students in public colleges possess the right to all due process protection in any disciplinary proceeding which involves long-term suspension or expulsion. This means that in these types of proceedings an accused student must be given adequate notice and an opportunity for a hearing.

Just what is due process? There is no absolute and final definition of due process of law. Courts have refused to formulate a precise definition and have preferred to

define it by the gradual process of judicial inclusion and exclusion.[4] In general, it may be said that due process is met when the principles of fair play are invoked and when actions are reasonable, just, and not arbitrary. Mr. Justice Frankfurter described the concept by saying: "It is not a technical conception with a fixed content unrelated to time, place, and circumstances . . . due process is not a mechanical instrument. It is not a yardstick. It is a delicate process of adjustment."[5]

There are two kinds of due process--procedural and substantive. Procedural due process refers to the procedure and methods employed in seeing that laws and regulations are carried out and enforced.

Substantive due process goes to the very heart of the law or regulation in question. It questions not merely the procedures and methods employed in any proceedings, but whether the purpose of the law or regulation is fair, reasonable, and just.

Student disciplinary proceedings have been held to be civil and not criminal proceedings and, therefore, do not necessarily require all of the judicial safeguards and rights accorded to criminal proceedings.[6]

Courts have held that private institutions are not engaged in "state action" and, therefore, are not subject to the due process clause in the 14th Amendment and are

not required to follow the dictates of due process in dealing with students.[7] However, I think that it is fair to say that most legal scholars see the distinctions that exist between public and private colleges losing their vitality--based upon the trend in court decisions.

Although it is impossible to cover every conceivable situation in a set of rules pertaining to students, due process requires that there should not be vagueness or overbreadth in those regulations. The degree of specificity of the rules will, of course, vary. Colleges and universities have not been required to have specific rules and regulations to the extent necessary in criminal statutes. However, "misconduct" as a standard for disciplinary action has been held unduly vague and overbroad.[8] The general standard in this area is that the degree of specificity required is that which allows a student to prepare adequately a defense against the charge.[9]

I believe that we have reached a plateau on campus rights insofar as basic constitutional guarantees are concerned. In my opinion, the legal spotlight in the future will be on academic matters, with arbitrary grading practices being given particular scrutiny. We can expect campus confrontations to become increasingly between students and faculty rather than between students and administrators. Also, academic freedom will indeed be examined with the

same scrutiny as has been given administrative policies and decisions.

Judicial Intervention in the Classroom

In academic affairs, the doctrine of judicial nonintervention has been followed by the courts. They are reluctant to interfere in any administrative proceeding unless there is a clear case of unfairness, arbitrariness, capriciousness, or unreasonableness. However, it seems that students are increasingly resorting to court action when they feel that they have been mistreated in the areas of academic affairs.

Faculty members have the same rights of speech and assembly as do all citizens and certainly they may not be censured or dismissed for the exercise of their constitutional rights. However, I think that it is clear that they will increasingly be made accountable for their actions both inside as well as outside the classroom insofar as maintaining the integrity of the educational institution.

There is abundant evidence to show the increasing concern for academic freedom and academic responsibility, and I stress the latter. The American Association of University Professors (AAUP) has urged its members to live up to their responsibilities to uphold academic freedom. In a statement calling upon faculty members to take the initiative in

maintaining the free marketplace of ideas and respect for the academic rights of others, the AAUP made these points:

> The expression of dissent and the attempt to produce change . . . may not be carried out in ways which injure individuals or damage institutional facilities or disrupt the classes of one's teachers or colleagues.
>
> Faculty members may not refuse to enroll or teach students on the grounds of their belief or the possible uses to which they may put the knowledge to be gained in a course.
>
> It is improper for an instructor persistently to intrude material which has no relation to his subject, or to fail to present the subject matter of his course as announced. . . .[10]

The Model Bill of Rights and Responsibilities by the Carnegie Commission on Higher Education included the following statement which again evidences concern for academic freedom and academic responsibility:

> Freedom to teach and to learn implies that the teacher has the right to determine the specific content of his course, within the established course definition, and the responsibility not to depart significantly from his area of competence or to divert significant time to material extraneous to the subject matter of his course.[11]

Certainly no one would deny the professor's right to establish standards of academic performance and to evaluate a student's progress in meeting these standards. But I would like to suggest the possibility that courts may entertain suits when professors have misused the classroom and thus allegedly violated the rights of the students.

The 1871 Civil Rights Act, which allows suits for damages in federal courts against any person acting under color of state law, custom, or usage who causes the protected rights of another to be violated, appears to have been discovered recently and is now the basis for suits against administrators for abdication of their responsibility in allowing the institution to be closed or to be politicized. This Act, as well as the contractual relationship between a student and the institution, may possibly allow for suits against professors who misuse their classroom or grade a student in an arbitrary or capricious manner.

Private schools are also subject to this type of court action since the legal relationship between students and a private institution is one of contract.

Although the courts do not specify precisely what constitutes due process, there are elements of fair play which can be implemented in the academic area with no attendant loss of professors' privileges or institutional autonomy. I would now like to recommend some in reference to academic due process. These elements should not be construed as specific prescriptions to cover every case but rather as guidelines. I suggest for your consideration and guidance:

1. Academic requirements for continuance and graduation should be clearly specified and publicized.

2. Standards for evaluating students' classroom performances should be precisely stated for each course, preferably in writing, no later than the first class meeting. The standards should clearly set forth the procedures and methods to be used by students in turning work in, the penalty for failure to meet the deadline for turning work in, the exact grading procedure, and the weighing of various assignments for grading purposes.
3. A well-defined and unambiguous definition of plagiarism should be disseminated to all students.
4. Students suspected of cheating or plagiarism should be afforded notice and an opportunity for a hearing. The hearing itself should conform to the standards of due process as required by courts for disciplinary proceedings.
5. A well-documented and orderly procedure of appeal should be established and promulgated for cases involving academic assessments which are allegedly based upon other than academic grounds and which can be clearly shown to be injurious to the student in his academic career.

A committee should be appointed in each department (or a single committee for the college if this is deemed more feasible) which would hear complaints by students against faculty members for alleged misuse of the classroom and/or arbitrary grading practices. After a successful showing by the student before this committee, the professor against whom the allegations have been made should be given all due process rights in defending his actions.

The implementation of these recommendations would not, in my opinion, open a Pandora's box with a proliferation of student complaints against professors. Rather, I believe that faculty members would tend to re-think and update their course content, requirements, and grading procedures. Students would more clearly understand what is required of them. The committee to hear complaints would merely formalize a fair and reasonable procedure which is now an informal one with no structure that nurtures distrust and disrespect. I believe an appreciation of the rights and responsibilities of faculty members and students would be served by the implementation of these guidelines. I also believe that the quality of instruction would be improved under such circumstances.

Faculty Constitutional Rights--Non-Renewal of Contracts

Faculty members may not be censured or dismissed for the exercise of their constitutional rights. This is beyond dispute and the cases which affirm this fact are too numerous to recount. The two decisions which are of prime importance and which were handed down by the United States Supreme Court are the Roth[12] and Sindermann[13] cases.

In the Roth case, a nontenured assistant professor at Wisconsin State University-Oshkosh on a one-year contract was not rehired. It so happened that Professor Roth had been very outspoken in campus controversies and was critical of the administrators of the university and the board. No reason was given him for the non-renewal of his contract. He filed suit in federal district court alleging that the non-renewal was retaliation against him for his expressions of opinion which were protected by the First and Fourteenth Amendments of the Federal Constitution. The District Court[14] held that he was entitled to procedural safeguards and ordered the University to furnish reasons to Professor Roth, to give notice of hearing, and to provide him with a hearing. Upon appeal to the Circuit Court of Appeals,[15] that court affirmed the lower court's decision that a faculty member was constitutionally entitled to be retained or given reasons for non-retention and a hearing on the

merits of the non-retention decision. The United States Supreme Court reversed the Court of Appeals and held that in the absence of an "accrued property right" a nontenured professor is not entitled to a hearing prior to the non-renewal of his contract. The Court did point out, however, that a hearing would be required if the non-renewal casts a stigma on the professor so that it may be injurious to him in the future.

In the Sindermann case, a professor at Odessa Junior College in Texas (a public institution) had been re-hired for four years under successive one-year contracts and was then notified that his contract would not be renewed. There was no formal tenure system in effect at the college; however, the following statement was included in the Faculty Guide:

> Teacher Tenure: Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his supervisors, and as long as he is happy in his work.

As in the Roth case, Professor Sindermann filed suit in federal district court alleging that the non-renewal of his contract was based upon his exercise of First and Fourteenth Amendment rights. He declared that his due process rights were abridged since he was given no notice or hearing prior to the non-renewal of his contract. That

court, in an unreported decision, granted summary judgment in favor of the defendants and against the professor. The Fifth Circuit Court of Appeals[16] ruled that a nontenured professor who has an "expectancy of reemployment" was indeed entitled to notice and hearing. Upon appeal to the United States Supreme Court, it was held that if the professor had an "accrued property right" by virtue of having been rehired for a number of years under what is tantamount to a "de facto" tenure system, then he is entitled to a hearing prior to the non-renewal of his contract. The Supreme Court did point out, however, that a mere "expectancy of reemployment" did not merit such treatment.

It should be pointed out that a formal hearing, employing all of the judicial safeguards required in criminal cases, is not absolutely essential in all cases. But in those instances where a professor opposes his termination and is entitled to a hearing, the Fifth Circuit Court of Appeals has listed the following procedures as affording minimum protections:

(a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist

(b) he be advised of the names and the nature of the testimony of witnesses against him

(c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense

(d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.[17]

Tort Liability

Another area which has been gaining increased concern on the part of faculty members and administrators is that of tort liability. The law grants to each individual certain personal rights with respect to conduct which he may expect from others. Some arise out of a contractual relationship while others are actions in damages independent of contract. These are usually actions in tort, a term applied to a civil wrong other than a breach of contract for which the courts will provide a remedy in the form of action for damages.

Higher education is certainly not immune to cases of this nature, as many are filed each year against institutions, teachers, and administrators. Public colleges and universities, as governmental agencies, enjoy governmental or sovereign immunity in many states. This immunity protects them from payment of damages in liability suits. However, this immunity may be waived by constitutional provision, statute, or by court decree. In tort liability cases, where governmental immunity does exist, negligence on the part of a public institution must, of course, be proven.

Individuals are not immune from suit regardless of whether they are employed in public or private institutions and thus may be sued for negligence. Negligence is the basis for a majority of suits involving colleges and universities.

In many instances, employees are covered under workmen's compensation laws which occasionally are the sole remedy available in cases of injuries or death.

Defamation is a tort which holds another person up to hatred, disgrace, ridicule or contempt. The torts of libel and slander are based on defamation. Libel is written defamation, while slander is oral defamation.

Cases filed under federal civil rights acts are not, strictly speaking, actions in tort. However, each year in higher education a significant number of cases are initiated under these acts.

As I have already noted, a faculty member is not protected by the cloak of "governmental immunity." It should be further noted that there is no way by which an individual teacher may escape liability for negligent conduct which results in injury to another individual. As a professor performs his or her normal duties, the "standard of care" required in connection with those activities is greater than in normal relationships.

The faculty member should know that the law recognizes three basic duties he has to his class. These

are (1) adequate supervision, (2) proper instruction, and (3) maintenance of all equipment used in a state of reasonable repair. The potential for liability suits involving negligence is great in the following areas: (1) laboratories, (2) physical education classes, (3) intercollegiate and intramural sports, (4) shops or other classes using potentially dangerous equipment and machinery, and (5) field trips.

Although administrators, as well as professors, are responsible for their actions, I would point out that as a general rule they are not liable for the actions of their subordinates.

The area of tort liability may have several ramifications affecting higher education if the age of majority is lowered. Adult students are responsible for their own actions and can sue and be sued. Without involving the parents in the case, the college is free to press charges against a student who damages property or in any way commits a tort against the institution. Students will thus be forced to accept more responsibility for their actions on campus, including the use of college facilities, and for publications which may be libelous.

On the other hand, if students are adults, it may well be that they would be more inclined to press charges against the institution and/or other students when they believe their rights have been violated. One example of

such action is where the institution is disrupted and possibly closed as a result of action by militants. Also, an adult student may be more prone to press charges against a professor who has allegedly graded him arbitrarily or unfairly or who may have misused the classroom. This is not to say that all students are apt to file a court suit when they reach the age of majority, but since they will then be clothed with the responsibilities which attach to that status, they will in all likelihood be more zealous of their rights.

Individual freedom is the cornerstone of a free society, and eternal vigilance is necessary in order to insure its survival. That survival is enhanced only if higher education flourishes as a responsible free marketplace of ideas in which the rights and responsibilities of all are recognized and accepted. The recognition and acceptance of both rights and responsibilities by administrators, faculty, and students is a prerequisite not only to public confidence and trust in higher education, but to building a better society in which each individual can progress to the fullest extent of his capacity and potential with maximum freedom.

FOOTNOTES

1. Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961).

2. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Numerous other decisions have been rendered in which this declaration has been made.

3. Esteban v. Central Missouri State College, 415 F. 2d 1077 (1969).

4. Davidson v. New Orleans, 96 U.S. 97 (1877).

5. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

6. This was first pointed out in Dixon and subsequent decisions are in unanimous agreement with that holding.

7. Powe v. Miles, 407 F. 2d 73 (1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (1968); Torres v. Puerto Rico Junior College, 298 F. Supp. 458 (1969); Blackburn v. Fisk University, 443 F. 2d 121 (1971); Coleman v. Wagner College, 429 F. 2d 1120 (1970); Robinson v. Davis, 447 F 2d 753 (1971); Ryan v. Hofstra University, 324 N.Y.S. 2d 964 (1971); Rowe v. Chandler, 332 F. Supp. 336 (1971); Brown v. Mitchell, 409 F. 2d 593 (1969).

8. Soglin v. Kauffman, 295 F. Supp. 978 (1968).

9. Scott v. Alabama State Board of Education, 300 F. Supp. 163 (1969).

10. "A Statement of the Association's Council: Freedom and Responsibility," 56 American Association of University Professors Bulletin, 375-376 (1970).

11. The Chronicle of Higher Education. March 15, 1971, p. 1.

12. 92 S. Ct. 2701 (1972).

13. 92 S. Ct. 2694 (1972).

14. Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (1970).

15. Roth v. Board of Regents of State Colleges, 446 F. 2d 806 (1971).

16. Sindermann v. Perry, 430 F. 2d 939 (1970).

17. Ferguson v. Thomas, 430 F. 2d 852 (1970).